

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

TOPMOST FOODS
(Petitioner)
c/o Gates McDonald

PRECEDENT
TAX DECISION
No. P-T-411
Case No. TFS-79-3

Employer Account No.

EMPLOYMENT DEVELOPMENT DEPARTMENT

Claimant: Eladia Magallenez
S.S.A. No:

Office of Appeals No. LB-TFS-21565

The Department appealed from the decision of the administrative law judge which granted the petitioner's petition for reassessment of an assessment levied under the provisions of section 1142 of the Unemployment Insurance Code.

STATEMENT OF FACTS

The claimant last worked for the employer herein on January 17, 1978 and was five months pregnant at that time. On or about April 21, 1978, the claimant filed a claim for unemployment benefits effective April 23, 1978.

On April 21, 1978 the Department mailed to the employer a notice of the claimant's unemployment insurance claim (Form DE 1101C). In response to the inquiry on that form, "If this person quit or was fired, explain in detail," the employer's personnel assistant stated, "She quit voluntary 1-17-78 due to pregnancy." The employer's response to the notice of new claim filed was mailed to the Department with a metered postmark of May 10, 1978, 19 days after the notice had been mailed to the employer.

On May 10, 1978 the claimant was interviewed by a Department representative at which time she stated she had been given a maternity leave of absence by her foreman and that when she went back to the employer on or about April 19, 1978 to check on going back to work she was told there were no openings.

The Department received the employer's response on May 15, 1978 indicating the claimant voluntarily quit her job on January 17, 1978 due to pregnancy. On May 18, 1978 a Department representative contacted the employer's personnel assistant (Fabiano) by telephone. The personnel assistant reported the claimant's foreman had informed her the claimant was laid off work on January 17, 1978 due to her pregnancy and that she was not given a leave of absence.

On May 23, 1978 the Department mailed a notice of potential employer false statement liability to the employer. That notice gave the employer ten days in which to submit an explanation why the information submitted by the employer in response to the notice of new claim filed should not be considered a wilful false statement or wilful failure to report a material fact. The employer did not respond to the Department's request for an explanation of the information given in its original protest.

On September 5, 1978 the Department mailed a notice of determination/or assessment on employer false statement which provided that under the provisions of section 1142 of the Unemployment Insurance Code, it had been assessed a cash penalty of ten times the claimant's weekly benefit amount of \$53 in the total amount of \$530.

On September 25, 1978, the employer filed an "appeal" which was considered as a petition for reassessment. The employer contended that it did not wilfully make a false statement; that it took the necessary measures to correct an inadvertent error; and that, since the employer's response to the initial claim was untimely, it was not entitled to a ruling; therefore, it could not be assessed a false statement penalty.

In support of its contentions, the employer cited Appeals Board Decision No. P-R-342.

REASONS FOR DECISION

Section 1327 of the Unemployment Insurance Code provides in pertinent part:

"The department shall give a notice of the filing of a new or additional claim to the employing unit by which the claimant was last employed immediately preceding the filing of such claim. The employing unit so notified shall submit within 10 days after the mailing of such notice any facts then known which may affect the claimant's eligibility for benefits. . . ."

Section 1328 of the Unemployment Insurance Code provides in pertinent part:

"The department shall consider the facts submitted by an employer pursuant to Section 1327 and make a determination as to the claimant's eligibility for benefits. The department shall promptly notify the claimant and any employer who prior to the determination has submitted any facts or given any notice pursuant to Section 1327 . . . and authorized regulations of the determination . . . and the reasons therefor. . . . The claimant and any such employer may appeal . . . to a referee within 20 days from mailing or personal service of notice of the determination The 20-day period may be extended for good cause, which shall include, but not be limited to, mistake, inadvertence, surprise, or excusable neglect. The director shall be an interested party to any appeal."

Section 1030 of the code provides in pertinent part:

"(a) Any employer who is entitled under Section 1327 to receive notice of the filing of a new or additional claim may, within 10 days after mailing of such notice, submit to the department any facts within its possession disclosing whether the claimant left such employer's employ voluntarily and without good cause or was discharged from such employment for misconduct connected with his or her work"

* * *

"(c) The department shall consider such facts together with any information in its possession and promptly notify the employer of its ruling as to the cause of the termination of the claimant's employment. . . ."

Former code section 1030.5 provided:

"If the director finds that any employer or any employee, officer, or agent of any employer, in submitting facts pursuant to Section 1030, 3701, or 4701, willfully makes a false statement or representation or willfully fails to report a material fact concerning the termination of a claimant's employment, the director shall make a determination thereon charging the employer's reserve account not less than 2 nor more than 10 times the weekly benefit amount of such claimant. The director shall give notice to the employer of a determination under this section. Appeals may be taken from said determinations in the same manner as appeals from determinations on benefit claims."

Former code section 1030.5 was repealed and section 1142 was added to the Unemployment Insurance Code by Chapter 511, Statutes of 1977, filed September 3, 1977 and which became operative January 1, 1978. Section 1142 of the Unemployment Insurance Code now provides:

"If the director finds that any employer or any employee, officer, or agent of any employer, in submitting facts concerning the termination of a claimant's employment pursuant to Section 1030, 1327, 3654, 3701, 4654, or 4701, willfully makes a false statement or representation or willfully fails to report a material fact concerning such termination, the director shall assess a penalty against the employer in an amount not less than 2 nor more than 10 times the weekly benefit amount of such claimant. The provisions of this article, the provisions of Article 9 (commencing with Section 1176) of this chapter with respect to refunds, and the provisions of Chapter 7 (commencing with Section 1701) of

this part with respect to collections shall apply to the assessments provided by this section. Penalties collected under this section shall be deposited in the contingent fund."

Section 1133 of the code provides for a petition for reassessment of an assessment levied under code section 1142, as follows:

"Any employing unit against whom an assessment is made under Section 1126, 1127, or 1142, or any person directly interested in such assessment, may file with a referee a petition for reassessment within 30 days after service of notice of the assessment. An additional 30 days for the filing of a petition may for good cause be granted by the referee. If a petition for reassessment is not filed within the 30-day period, or within the additional period granted by the referee, the assessment becomes final at the expiration of the period."

Prior to the repeal of former code section 1030.5, an employer was subject to a penalty if it wilfully made a false statement or representation or wilfully failed to report a material fact concerning the termination of a claimant's employment provided such facts were submitted pursuant to section 1030 or 3701 of the code. However, even if the facts submitted were patently false and wilfully made, the employer was not subject to a penalty if the facts were not submitted pursuant to section 1030 or 3701 of the code (Appeals Board Decision No. P-R-342).

In Appeals Board Decision No. P-T-407, the Board stated:

"In Appeals Board Decision No. P-R-342, the Board held that the language of former code section 1030.5 limited the assessment of charges to situations where the employer has performed the acts which cause it to become entitled to a ruling under section 1030 or 3701 of the code. The Board said:

"'It appears anomalous that an employer, who has made a willful false statement, may avoid charges to its account under section 1030.5 of the code simply by failing to comply with section 1327 of the code. However, employers may be deterred from taking advantage of this deficiency in the legislation by the provisions of Chapter 10, Part I, of the Unemployment Insurance Code, which make certain violations of the code misdemeanors. If this is an insufficient deterrent, as [sic] is a matter for legislative attention and is beyond our authority to remedy.'

"It is clear that the legislature intended to remedy the deficiency by the enactment of section 1142 of the Unemployment Insurance Code. . . ."

The Board then held the provisions for the assessment of a cash penalty under section 1142 of the code applied to all employers whether or not they maintain a reserve account and perform the acts which cause them to be entitled to a ruling and overruled Appeals Board Decision No. P-R-342.

The factual situation in Appeals Board Decision No. P-T-407 did not involve an employer's failure to comply with the time limits when submitting information concerning the termination of a claimant's employment as in the instant case.

By overruling Appeals Board Decision No. P-R-342 wherein the employer did fail to submit facts within the time specified in sections 1327 and 1030(a) of the code and holding that the assessment of a cash penalty under code section 1142 was applicable to all employers whether or not they had performed the acts which entitled them to a ruling, this Board, by implication, held that employers who submit facts after the time limit in which to do so are nevertheless subject to the provisions of code section 1142. We now address that specific issue.

In view of the enactment of code section 1142, it is necessary to reexamine our views expressed in prior decisions as to the meaning of the term "pursuant to" as used in that section. As stated in 45 Cal. Jur. 2d 625, section 116:

"Statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers -- one that is practical rather than technical, and that will lead to a wise policy rather than to mischief or absurdity. . . ."

The Board has heretofore held that the term "pursuant to" as used in former code section 1030.5, punctuated as it was, was restrictive in that it limited the penalty provisions of that section to situations wherein the employer had performed the acts necessary for it to become entitled to a ruling.

In Appeals Board Decision No. P-R-341, the employer's oral statement was held not to constitute facts submitted "pursuant to" section 1030 of the code, even though wilfully false, as it did not entitle the employer to a ruling. In Appeals Board Decision No. P-R-342, the Board held, where an employer submitted facts after the time limit required by section 1327 of the code and permitted under section 1030(a) of the code, such facts were not submitted "pursuant to" those sections and the employer was not entitled to a ruling. In both instances, the Board noted that, although the result reached permitted an employer who has made a wilful false statement to avoid a penalty, the matter was for legislative attention and was beyond its authority to remedy.

Section 1142 of the code was enacted after the issuance of Appeals Board Decisions Nos. P-R-341 and P-R-342, and remedied the prior deficiencies in existing law which permitted employers to make wilful false statements or representations or to wilfully fail to report material facts concerning the termination of a claimant's employment simply by submitting such information orally or after the specified time limits within which to do so.

Section 15 of the General Provisions of the code provides: "'Shall' is mandatory and 'may' is permissive." Therefore, sections 1327, 3654 and 4654 are mandatory in nature as they provide an employer shall submit any facts then known which may affect a claimant's eligibility for benefits. An employer is not required to submit facts under section 1030, 3701, or 4701 of the code. If the employer is dilatory in responding to a notice of a new or additional claim, it simply loses its right to receive a ruling and its right to appeal therefrom. Nevertheless, the Department is required to consider all

information in its possession relating to a claimant's eligibility for benefits and is not prevented from considering information received from an employer which is submitted beyond the time limits within which the employer is required to respond.

Therefore, it is evident that where an employer responds to a notice of new or additional claim and submits facts either orally or in writing concerning the termination of a claimant's employment, those facts are submitted "pursuant to" section 1327, 3654 or 4654 for the purposes of section 1142 of the code. This is true regardless of the fact that such submission is beyond the time limit to be in conformance with the requirements that entitle the employer to a ruling under section 1030, 3701 or 4701 of the code and to appeal therefrom. Consequently, we hold that an employer's response, whether written or oral, to a notice of new or additional claim may be considered in determining such employer's liability for a false statement under the provisions of code section 1142 without regard to whether such response was timely for the purposes of the employer's entitlement to a ruling.

Since the rationale of Appeals Board Decision No. P-R-341 is also no longer applicable to assessments levied under the provisions of section 1142 of the code, it is inconsistent with our holding in Appeals Board Decision No. P-T-407 and our decision herein. We therefore overrule Appeals Board Decision No. P-R-341.

In the present case, the employer, as the claimant's last employer, was entitled to notice of the new claim filed by the claimant and was required to respond to that notice under the provisions of code section 1327. The employer's response was not submitted within the ten-day period required under section 1327 of the code or permitted under section 1030(a) of the code, therefore it lost its right to receive a ruling and its right to appeal therefrom. Nevertheless, the employer's response was submitted as required by section 1327 of the code, and therefore "pursuant to" that section for the purpose of section 1142 of the code irrespective of the employer's entitlement to receive a ruling.

The employer submitted information which indicated the claimant voluntarily quit her job due to pregnancy. That information was false as the claimant was laid off

work due to her pregnancy and was not given a leave of absence. Therefore, the employer is subject to the penalty provisions of code section 1142 if it wilfully made a false statement or representation or wilfully failed to report a material fact concerning the reasons for the claimant's termination of employment.

There need not be an intent to deceive in order that the submission of false information may be considered a wilful misrepresentation (Diagnostic Data, Inc. v. California Unemployment Insurance Appeals Board (34 Cal. App. 3d 556, 110 Cal. Rptr. 157)). The employer gave false information as to the reason for the claimant's termination of employment when it informed the Department the claimant voluntarily quit her job. Whether or not the employer intended to misrepresent the facts, its act was wilful and the assessment of a cash penalty was proper. Since the employer did subsequently correct the false information submitted to the Department even though it did not respond to the notice of potential charges, it is appropriate to reduce the maximum assessment from ten times the claimant's weekly benefit amount to five times the claimant's weekly benefit amount (Appeals Board Decision No. P-R-343).

DECISION

The decision of the administrative law judge is reversed and the assessment is modified. The employer is assessed a cash penalty of five times the claimant's weekly benefit amount of \$53 in the total amount of \$265.

Sacramento, California, March 11, 1980.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

HARRY K. GRAFE

HERBERT RHODES

LORETTA A. WALKER